No. 10,937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern District of California, and FRANCIS BIDDLE, Attorney General of the United States,

Appellees.

BRIEF FOR APPELLEE, GEORGE VICE.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco 1,
Attorneys for Appellee,
George Vice, United States Marshal for
the Northern District of California.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Jurisdictional Statement	1
Statement of the Case	2
Question	3
Argument	3
Conclusion	6

Table of Authorities Cited

Cases

	Page
Albert ex rel. Ravin v. Gougen (CCA-1), 141 Fed. (2d) 302	4
Bagley v. United States, 144 F. (2d) 788	2
Ex parte Catanzaro (CCA-3), 138 F. (2d) 100, cert. denied 321 U. S. 793	4
Johnston v. Zerbst, 304 U. S. 458	5
United States ex rel. Arpaia v. Alexander (CCA-2), decided January 22, 1945, ... Fed. (2d)	4
United States ex rel. Catanzaro v. Hiatt (M. D. Pa.), 55 Fed. Supp. 86	4
United States ex rel. Falbo v. Kennedy (CCA-4), 141 Fed. (2d) 689, cert. denied 322 U. S. 745	4
United States ex rel. Hoce v. McGinnis (CCA-4), decided December 6, 1944, ... Fed. (2d)	5
United States ex rel. Lohrberg v. Nicholson (CCA-4), 141 Fed. (2d) 689, cert. denied 322 U. S. 744	4
United States ex rel. Schafer v. Bezona (E. D. Wash), 54 Fed. Supp. 1019	5
Ver Mehren v. Sirmyer, 36 Fed. (2d) 876	5
Walker v. Johnston, 312 U. S. 275	5

Statutes

Title 28 U. S. C. A., Sections 451, 452 and 453	1
Title 28 U. S. C. A., Sections 463 and 225	1
50 U. S. C. A., Section 311	2

No. 10,937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK W. BAGLEY,

Appellant,

vs.

GEORGE VICE, United States Marshal for the Northern District of California, and FRANCIS BIDDLE, Attorney General of the United States,

Appellees.

BRIEF FOR APPELLEE, GEORGE VICE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California dismissing appellant's petition for writ of habeas corpus (Tr. p. 17). The District Court had jurisdiction of the habeas corpus proceeding under Title 28 U.S.C.A., Sections 451, 452 and 453. Jurisdiction to review the District Court's order dismissing the petition is conferred upon this Court by Title 28, U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

Appellant is an alleged conscientious objector, although both his Local Board and the Appeal Board unanimously decided that he was not entitled to classification as such and found him available for general military service. He was duly ordered to report for induction, refused to report, was indicted in the United States District Court for the Northern District of California for violation of the Selective Training and Service Act of 1940, 50 U.S.C.A., Section 311, tried by a jury and convicted. He appealed on the ground that the Draft Board and the Appeal Board had denied him due process in classifying him and had his conviction affirmed in

Bagley v. United States, 144 F. (2d) 788.

Appellant thereafter surrendered to the United States Marshal for the Northern District of California, the appellee herein, and filed a petition for a writ of habeas corpus in the Court below urging in substance the same arguments as he had raised in the appeal from his conviction. The appellant then moved to dismiss the petition on the ground that the same was insufficient on its face to justify the issuance of a writ of habeas corpus (Tr. p. 15), and the Court, after consideration of the pleadings, filed a memorandum and order dismissing the petition (Tr. p. 17). From this order the appellant now appeals (Tr. p. 19).

QUESTION.

Is the writ of habeas corpus available to a prisoner convicted of violating the Selective Service Act on the ground that his Draft Board and the Appeal Board acted improperly in classifying him?

ARGUMENT.

The appellant in his opening brief declares the issue involved herein to be as follows: "Did the District Court violate the implied mandate of this Court in Bagley v. United States, supra, by ruling that the writ of habeas corpus was not available to the appellant?"

In his Statement of the Case appellant refers to the following dictum of this Honorable Court as an "implied mandate":

> "* * * Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error the writ of habeas corpus has of late years been greatly enlarged, and where the registrant has exhausted the remedies provided, he may test the 'due process' question by resort to this remedial writ."
>
> (Appellant's Brief, p. 2, lines 7 through 15.)

If we accept as correct what appellant states to be the issue in this case, then we would be disregarding the fundamental rule of criminal law involved. The present custody of the appellant can only be invalid

if his conviction or sentence is invalid. The same matters that would not invalidate his conviction can not invalidate his imprisonment under that conviction. In the dictum above referred to this Honorable Court said that Bagley "may test the 'due process' question by resort to this remedial writ". It must be apparent that this Court referred to a denial of due process in the conviction but not to a denial of due process in the Selective Service classification.

The controlling cases supporting appellee's contention that the writ of habeas corpus is not available to the appellant herein are:

United States ex rel. Falbo v. Kennedy and *United States ex rel. Lohrberg v. Nicholson* (CCA-4), 141 Fed. (2d) 689, cert. denied 322 U. S. 744, 745;

United States ex rel. Arpaia v. Alexander (CCA-2), decided January 22, 1945, ... Fed. (2d) .....

The appellant cites none of these cases in his brief and the failure on his part can be well understood in view of the fact that the issue involved in these cases is identical with the issue involved in the case at bar, decided adversely to the appellants.

See also:

Albert ex rel. Ravin v. Gougen (CCA-1), 141 Fed. (2d) 302;

Ex parte Catanzaro (CCA-3), 138 F. (2d) 100, cert. denied 321 U. S. 793;

United States ex rel. Catanzaro v. Hiatt (M.D. Pa.), 55 Fed. Supp. 86;

United States ex rel. Schafer v. Bezona (E.D. Wash.), 54 Fed. Supp. 1019;

United States ex rel. Hoce v. McGinnis (CCA-4), decided December 6, 1944, ... Fed. (2d) .....

On page 4 of his brief appellant says:

"* * * the remedy of habeas corpus is available upon allegation and proof that a denial of due process exists."

The appellant confuses the issue when he speaks in this wise. An inductee in the armed forces may test the validity of his induction and he may use habeas corpus as an appropriate means of doing so; however, as we have already stated, the appellant is imprisoned by virtue of his conviction. All that he may test, therefore, is the validity of that conviction.

The appellant relies on the cases of *Johnston v. Zerbst,* 304 U. S. 458, and *Walker v. Johnston,* 312 U. S. 275, but in these cases the conviction was attacked. Here the appellant is not attacking his conviction, which is admittedly valid, and has been affirmed on appeal.

The appellant cites *Ver Mehren v. Sirmyer,* 36 F. (2d) 876. Here the question was whether or not the registrant had ever been inducted and therefore subject to military jurisdiction. The case involved failure to send notices necessary for the automatic induction under the Selective Service Act of 1917. Since these notices were not properly sent the registrant was not

automatically inducted and could not be held as a deserter.

An analysis of the other cases cited by appellant in his brief likewise indicates that they are not in point. All, therefore, that remains to give the appellant any shred of comfort is the dictum of this Honorable Court in the *Bagley* case, supra, but as we pointed out, we believe this Court spoke of the denial of due process in the conviction and not of due process in the denial of Selective Service classification. In view of the Supreme Court's denial of certiorari in the *Falbo* case, cited supra, we believe that no other conclusion can be reached than this.

CONCLUSION.

It is therefore respectfully urged that the order of the Court below dismissing the petition for writ of habeas corpus was correct and should be affirmed. To decide otherwise is to open a field of litigation never contemplated by habeas corpus and thus weaken its effectiveness.

Dated, San Francisco,
April 26, 1945.

Respectfully submitted,
FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee,
George Vice, United States Marshal for the Northern District of California.